



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-9

FACTS:

You are counsel for Mr. A, Mr. B, Mr. C and Ms. D, and requested a formal advisory opinion from the Commission on their behalf pursuant to G.L. c. 268A, §10, and c. 268B, §3(g). Mr. A was the Executive Director of a state agency (Agency One) until December 31, 1992, when his resignation became effective. Mr. A has entered into a consultant contract with Agency One, for the period of January 1, 1993 through March 1, 1993. This contract allows for private employment during normal business hours, and specifies that he will perform services on no more than sixty days during the contract period. His consultation consists of responding to specific questions posed by his successor. He does not have the authority to approve any agency matters, and does not know whether his advice is or will be implemented. Agency One is a "state agency"^{1/} within the meaning of the conflict of interest law, G.L. c. 268A. Mr. A continues to be a "state employee" by virtue of his regular consultation to Agency One.

Upon Mr. A's departure as Executive Director of Agency One, he filed the appropriate paperwork creating Mr. A & Company, Inc. (the Corporation), an incorporated company of which he is sole shareholder, president, treasurer and clerk.

Mr. B, Mr. C and Ms. D are private citizens who are interested in forming a business organization with Mr. A after he leaves state service. They want to amend the articles of incorporation of the Corporation, so that Ms. D will be listed as Treasurer, Mr. C will be registered as Secretary, and Ms. D, Mr. B and Mr. C will each have the option to purchase $16\frac{2}{3}\%$ of the Corporation, leaving Mr. A with 50% ownership. Ms. D, Mr. B and Mr. C will pay start-up costs for consideration of the purchase option.

Ms. D, Mr. B and Mr. C are the principals of a separate business organization, (Company X). Mr. A does not have any ownership interest in Company X, although he may enter into a short-term personal services contract with Company X after he leaves state service, while this opinion is pending.

Company X has had contact with Agency One on two matters during Mr. A's tenure at Agency One. In early 1992, Company X represented a development group that was interested in responding to a request for proposals (RFP) to build a computer facility in a city (the City) for the a second state agency (Agency Two). Mr. B and Mr. C, as representatives of Company X, approached Agency One for information concerning Agency One's interest in providing financing for the Agency Two project. Mr. A met with Mr. B and Mr. C in or about January 1992 to discuss these matters. He also had a telephone conversation with one of Company X's competitors regarding the Agency Two project. Other employees of Agency One met with or had telephone conversations regarding the Agency Two project with another Company X competitor. In August 1992, another state agency (Agency Three) issued an Addendum to the original RFP (Amended RFP). Neither Mr. A, nor anyone else at Agency One (to Mr. A's knowledge) has had any other involvement in the original or Amended RFP since the various requests for information in early 1992. The Amended RFP involves a super-computer facility in the City to be used by Agency Two and other state agencies. Mr. A does not intend to have any connection to either the original or amended computer facility projects while he is in a private capacity.

The second matter involves a proposal to develop and construct a new construction project (the Project) for a fourth state agency (Agency Four). Company X represents a potential bidder on this project. Representatives of Company X met with Mr. A in early 1992 and the summer of 1992, to solicit information regarding Agency One's interest in and capacity to provide financing for the Project. On December 17, 1992, Mr. B and Mr. C met with staff members and the General Manager of Agency Four regarding their Project proposal. Agency One

personnel were also present to provide information about Agency One financing. Mr. A abstained from participation in this December 17, 1992 meeting, and any further Company X matters, as he had commenced “nascent discussions” regarding prospective business associations with Mr. B, Mr. C and Ms. D.^{2/} At present, Agency Four has not issued an RFP. If the Project does go forward, Company X would presumably be compensated for its efforts. The Corporation would receive no monies from the Project.

QUESTIONS:

1. Are there any restrictions on Mr. A’s private activities after the termination of his appointment as Executive Director of Agency One on December 31, 1992?
2. Are there any restrictions on the private activities of Mr. B, Ms. D and Mr. C if they become officers and/or part owners in the Corporation?

ANSWERS:

1. Yes, as set forth below.
2. No, as they are not “partners” under §5.

DISCUSSION:

Restrictions on Mr. A’s Private Activities Under §4

As Mr. A will be employed by Agency One as a consultant immediately upon his resignation as Executive Director of Agency One, Mr. A will not become a “former state employee” until the termination of his consultation with Agency One.^{3/} The prohibitions of §4 will apply to Mr. A as a current special state employee^{4/} because of his consultation for Agency One.

Section 4 generally prohibits a state employee from receiving compensation from, or acting as attorney or agent for, anyone other than the Commonwealth in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest. This reflects the basic principle that a person cannot serve two masters. Whenever an employee works for private interests in matters in which the state also has an interest, there is a potential for divided loyalties. *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977); *In re Bagni*, 1980 SEC 30, 32. This prohibition applies in a less restrictive manner to special state employees. Accordingly, as a special state employee, Mr. A would be prohibited from receiving compensation from, or acting as an agent or attorney for, anyone other than the Commonwealth only in relation to a particular matter in which (a) he had participated in as a state employee, (b) is or within one year had been a subject of his official responsibility^{5/}, or (c) is pending within a state agency in which he is serving. Note that clause (c) is not applicable to a special state employee who serves (in his special state employee position) on no more than 60 days during any period of 365 days.

As Executive Director of Agency One, Mr. A had comprehensive official responsibility for agency matters, whether he participated in them or not. Thus, while he is consulting for Agency One, he may not receive compensation from or act as agent or attorney for anyone other than the state in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest, if it was within his official responsibility during the previous year. Thus, he may not receive compensation or act as agent for a private party in relation to particular matters in which he had official responsibility, such as the original Agency Two RFP or the Agency Four project. While he is consulting for Agency One, if he chooses to enter simultaneously into a contract with Company X, he may not receive compensation or act as agent in relation to any matters, for any private party, which were under his official responsibility at Agency One for the previous year, or in which he had at any time participated as a state employee.

In *EC-COI-92-25*, the Commission held that in general, a public employee acts as agent for the purpose of G.L. c. 268A when he speaks or acts on behalf of another in a representational capacity. See *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992); *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610-11 (1984); *In re Reynolds*, 1989 SEC 423, 427. See also *Commission Advisory No. 13 (Agency)*. We have repeatedly

given as examples of acting as agent appearing before a government agency on behalf of another, submitting an application or other document to the government for another, or serving as another's spokesperson. *See, e.g., EC-COI-92-18.* Of course, Mr. A may act as an agent for Company X or any other private entity if his private activity is not in relation to a matter in which the state has an interest, or is otherwise not within the scope of §4 as discussed above.

Restrictions on Mr. A's Private Activities Under §5(a)

Section 5(a) prohibits a former state employee from acting as an agent or attorney for or receiving compensation^{6/} directly or indirectly from anyone other than the Commonwealth in connection with any particular matter^{7/} in which the state or a state agency is a party or has a direct and substantial interest and the matter was one in which the employee officially participated.^{8/} Therefore, in regard to matters in which Mr. A officially participated as a Agency One employee, this section will permanently restrict his ability to act as agent or attorney for or receive compensation from anyone other than the Commonwealth, after he terminates state employment. Again, Mr. A will only become a "former state employee" after termination of his consultation for Agency One.

We note that participation may be found with regard to matters which were pending during Mr. A's Agency One employment, where he did not personally handle the matter, but rather, he supervised the work of subordinates. *See EC-COI-89-7* (a state employee's participation in discussion or approval of subordinate's recommendation is more than ministerial in nature); *EC-COI-79-57.*

Mr. A participated in both the original Agency Two RFP and the Agency Four project, as he personally advised Company X about Agency One's interest in and capacity to finance these projects. Thus, he is forever precluded from receiving compensation from anyone other than the Commonwealth or a state agency for any private activity that is "in connection with" these matters. We need not discuss whether or not there are limitations on Mr. A's ability to participate in the Amended Agency Two RFP, as he has indicated that he does not intend to participate in the Amended RFP in his private capacity.^{9/} Additionally, nothing in §5 will prohibit Mr. A from participating in either the Agency Three or Agency Four projects as a consultant to Agency One, as he will be acting as a state employee.

Finally, Mr. A cannot receive income that is based upon services provided by the Corporation's employees or officers, that Mr. A could not provide himself. The Commission has held that if one is merely an investor, and receives nothing more than a return on an investment, the return on investment is not "compensation," as it is not "in return for services rendered by another." *See G.L. c. 268A, §1(a).* *See also, EC-COI-89-13; 86-03; 85-17.* However, if an individual is active in the business, he cannot receive a share of profits related to a particular matter from a prohibited source, even if he did not work on that particular matter himself, as it is deemed the receipt of money in return for services rendered by another, and is therefore "compensation." *See EC-COI-85-38; 85-21; 85-20.*

In the present case, Mr. A is an active member of the Corporation, and not merely an investor. While Mr. A may not receive compensation in connection with particular matters in which he participated as a state employee, that ban does not extend to other members of the Corporation. Mr. A may not receive any income from these prohibited sources. Therefore, the proceeds from the prohibited sources must be segregated from any pool of money which is used to pay the individual his salary or to determine his share of profits. *See EC-COI-89-5; 85-38; 85-21; 85-20.* You have indicated that the Corporation (through employees or officers other than Mr. A) has no intention at this time to engage in private work in connection with these matters. However, these principles would apply to any other particular matter that Mr. A participated in as a state employee.

Restrictions on Mr. A's Private Activities Under §5(b)

Section 5(b) prohibits a former state employee from personally appearing^{10/} before any court or agency of the Commonwealth within one year after leaving state service in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest and if the matter was under the official responsibility of the employee within the two years prior to the termination of such state employment.

If, for example, Mr. A had official responsibility for the work of several employees, and did not personally supervise their work, he would still be restricted from personally appearing before any court or state agency for a period of one year in connection with those matters handled completely by his subordinates during his final two years at Agency One. Such matters were under Mr. A's official responsibility, notwithstanding the fact that he did not participate in them.

Based upon your facts, under §5(b), Mr. A may not appear before a court or agency of the Commonwealth until one year from the termination of his consultation for Agency One, in connection with a particular matter which was under his official responsibility during the two years before the termination of his consultation. The one year waiting period does *not* begin on December 31, 1992 (the day Mr. A's resignation as Executive Director of Agency One becomes effective) because §5 specifies that the waiting period begins one year after his *last* employment has ceased. Mr. A's consultation is with the same state agency, to take effect upon (or shortly after) his resignation as Executive Director; therefore, he is continuing his employment with Agency One (although in a different capacity). *Cf. EC-COI-92-16*. Thus, Mr. A's consulting post with Agency One in effect tolls the one-year bar of §5(b).

Partners of a Former State Employee: Restrictions on the Private Activities of Mr. B, Ms. D and Mr. C Under §5(c)

The same restrictions that apply to Mr. A under §5(a) will apply to his partners during the one-year period following Mr. A's completion of state services. G.L. c. 268A, §5(c). Thus, the issue is whether Mr. B, Ms. D and Mr. C can be considered Mr. A's "partners" under §5.

The term "partner" is not specifically defined in G.L. c. 268A. However, the Commission has construed the term in previous opinions. *See EC-COI-87-34; 87-29; 86-03; 85-62; 84-78*. In order to advance the purposes of the conflict of interest law, which "was enacted as part of `comprehensive legislation...[to] strike at corruption in public office ... for private gain,'" *McMann* at 427, the term "partner" is not restricted to those who enter formal partnership agreements. Thus, where business ties are indeterminate, the Commission has held that a partner is any person who joins with another, formally or informally, in a common business venture, and that the substance of the relationship is what matters, not merely the terms the parties use to describe the relationship.^{11/} *EC-COI-84-78*.

While our broad interpretation of the word "partner" under G.L. c. 268A has proved helpful in clarifying situations in which business ties are either unclear or misleading, it is not our function to revise the terms of statutorily defined business arrangements. *See* G.L. c. 108A (partnerships), G.L. c. 156B (business corporations).^{12/} "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the *ordinary and approved usage of the language*, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Commonwealth v. Galvin*, 388 Mass. 326, 328 (1983); *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992) (emphasis added). The language and history of the conflict of interest law indicates that the drafters discerned a difference between partnerships and other forms of business arrangements. While §5 of G.L. c. 268A discusses only "partners" of a state employee, §6 addresses both "partners" and "business organization[s] in which [the state employee] is serving as officer." *See also* Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, at 13-4; Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 350-351 (1965).

In the present case, a corporation is contemplated. While we reserve the right to review the substance of a corporate entity according to the principles enunciated in *Evan v. Multicon Const. Corp.*, 30 Mass.App.Ct. 728, *further appellate review denied*, 410 Mass. 1104 (1991) (disregarding a corporate entity),^{13/} it is too speculative for us to comment on the substance of an organization that has not yet been formed. Therefore, we will presume that the proposed Company will be properly incorporated, with an eye towards the *Evan* factors.

All four individuals will thus be officers of a corporation. Mr. A will be the sole owner while the others will have the option to purchase a set percentage of ownership interests in the corporation. Therefore, Ms. D, Mr. B and Mr. C are not "partners" under §5, even in light of the broad purposes of this section.^{14/} On the present facts, then, the conflict of interest law does not prohibit these activities.

Date Authorized: March 30, 1993

¹“State agency,” any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, §1(p).

²Mr. A filed a §6 disclosure with this Commission with respect to this matter. This opinion addresses only his future conduct. *See* G.L. c. 268B, §3(g).

³This is true whether or not he is compensated for his consulting work by XYZ. *Cf. EC-COI-92-16* (State employee who resigned from one state agency and a year later, was hired by a second state agency, was both a former and current state employee, implicating §4 and §5 simultaneously).

⁴“Special state employee,” a state employee:

- (1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or
- (2) who is not an elected official and
 - (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or
 - (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

⁵“Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

⁶“Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

⁷“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁸“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

⁹If Mr. A were interested in private work regarding the Amended RFP, we would need to determine whether that work was “in connection with” the particular matter in which he participated as a state employee. We would make this determination by analyzing whether the private work is “integrally related” to the government matter because they involve “the same parties, the same litigation, the same issues or the same controversy,” and the effect the proposed private work would have on the government matter. *EC-COI-92-17*.

¹⁰The Commission has previously interpreted “personally appearing” to include, in addition to physically appearing before a court or agency of the Commonwealth, contacting an agency or court in person or in writing.” *See EC-COI-87-27*.

¹¹This opinion does not overrule precedent which involves this principle, in cases where a particular business association’s classification is vague or misleading.

¹²In fact, G.L. c. 108A, §4, which defines “partnerships” as an association of two or more persons who carry on as co-owners of a business for profit, specifically states that any association formed under any other statute of this state is not a partnership under this chapter. Thus, a corporation formed under G.L. c. 156B cannot be a partnership under c. 108A.

¹³The twelve factors which should be considered in deciding whether to penetrate the corporate form are: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity assets, or management; (4) thin capitalization; (5) nonobservance of

corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at time of litigated transaction; (9) siphoning away of corporate assets by dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of corporation for transactions of the dominant shareholders; (12) use of corporation in promoting fraud.

¹⁴Professional corporation and limited partnership issues are not before the Commission at this time. Thus, this opinion does not address those matters.